

February 13, 2003

VIA ELECTRONIC FILING

Honorable Michael K. Powell, Chairman
Honorable Kathleen Q. Abernathy, Commissioner
Honorable Michael J. Copps, Commissioner
Honorable Kevin J. Martin, Commissioner
Honorable Jonathan S. Adelstein, Commissioner
Federal Communications Commission
445 12th Street, S.W.
Washington, D.C. 20054

Re: Ex Parte
CC Docket Nos. 01-338, 98-147, 96-98

Dear Chairman Powell and Commissioners:

The undersigned companies are certificated as competitive local exchange carriers ("CLECs") in the State of Texas. We urge the Commission to maintain and strengthen the process of sharing responsibility with State Commissions for the implementation of the Federal Telecommunications Act of 1996. As discussed herein, State Commissions are in the best position to fully develop and thoroughly test the evidence regarding availability of unbundled network elements ("UNEs"). Our experience with the work of the Texas Commission provides a real world example of the importance of the States' role.

Following the FCC's 1996 *Local Competition Order* urging that states should "continue to pursue their own pro-competitive policies," the Public Utility Commission of Texas ("PUCT") established conditions critical to a development of a vibrant competitive environment. It is interesting to compare the state of competition in Texas today with the conditions that existed when Southwestern Bell Communications ("SBC") initially filed its 271 interLATA entry application. At that time, SBC indicated in response to a request for information issued by the PUCT's staff that not a single unbundled network element ("UNE") had been provisioned to a CLEC. At the conclusion of a rigorous collaborative process, Texas produced a model interconnection agreement (the "T2A"); and the FCC's most recent *Local Telephone Competition Report* now lists Texas as the state with the second largest number of access lines served by CLECs. The ability of the companies listed below to do business in this State and the opportunity for Texans to have competitive choices for telephone service are directly related to the ability of our state regulators to thoroughly evaluate and issue rulings based on local conditions.

State Commissions are in the best position to conduct the granular analysis required to determine which UNEs are necessary to ensure robust competition. It would be illogical to attempt such an analysis without establishing an evidentiary record developed through the rigors of discovery, sworn testimony and cross examination. The Texas Commission is regularly called upon to determine facts based on an evidentiary record, and has in place procedures well-suited to the granular analysis necessary to ensure that competitive gains aren't lost in a sea of unverified assertions.

For example, the FCC has received filings in this proceeding asserting that Local Exchange Routing Guide ("LERG") data provide "proof" that self-provisioned CLEC switching is widely available. SBC made the same assertion in Texas Docket 24542. In the Texas case, however, the assertion was subject to sworn rebuttal testimony and cross-examination; consequently, an empirical record was established that undermined the use of LERG data as a valid measurement of CLEC self-provisioned switches. In its decision, the PUCT Arbitrators disagreed "with [SBC] that the sole standard for removing unbundled switching is the ability of CLECs to self-supply switching." The PUCT went on to note that even if self-supply was the sole criteria, the "Arbitrators find that determining the number of CLEC-owned switches, a seemingly simple factual matter, was the source of considerable dispute in this proceeding."¹ The evidence showed that the ILEC's approach of simply counting switches listed in the LERG did not provide reliable indicia of the actual provisioning of local service by the switches listed in the LERG.² The LERG, the record evidence demonstrated, may be reliable as a call routing guide, but it should not be relied upon as an inventory of available switches, much less of the availability of competitive local switching service.

In the same vein, SBC alleged that the number of collocations in Texas indicated that CLECs would not be impaired without the unbundled local switching. Like the ILEC's LERG claims, this argument has some superficial appeal. A close review of the evidence presented in Docket No. 24542, however, showed that the data presented by SBC in its direct testimony was incorrect. SBC's witness admitted on cross-examination that the original data was "wildly inaccurate."³ While SBC's witness did manage to correct the data in the course of the proceeding, he did not know whether the incorrect SBC data had previously been given to the PUCT in its collocation-related proceedings.⁴ Without an adversarial proceeding featuring

¹ Texas PUC Docket No. 24542, Revised Arbitration Award, at 71-72. The Docket 24542 Revised Arbitration Award has been filed in the Triennial Review docket..

² Texas PUC Docket No. 24542, Supplemental Testimony of John Ivanuska on Behalf of Birch Telecom, UNE-P Coalition Exhibit 6, at 1-5.

³ Texas PUC Docket No. 24542, Hearing Tr. At 270.

⁴ *Id.*, at Tr. (Q: "Do you know whether Southwestern Bell has provided this [incorrect] data in any other proceeding when it's been asked the number of collocators in its central offices? A (Dr. Fitzsimmons): I do not know.")

sworn testimony and cross-examination, factual errors like these would go unchallenged, and critical factual findings would be distorted.

The importance of developing an evidentiary record was also clear in Texas Docket No. 24542 regarding the operational and economic barriers facing CLECs if unbundled local switching is restricted. ILEC pronouncements at national forums have cavalierly ignored the considerable operational and economic barriers that would be encountered by CLECs if certain UNEs were stricken by the FCC. However, the factual record established in Texas contains the sworn testimony of SBC's own witness confirming the operational and cost barriers that exist in the State.⁵ SBC's witness was asked to describe the problems caused by switching a line from one switch to another (the process UNE-P CLECs would have to undertake to convert customers from SBC switching to another source of switching). The following exchange ensued:

Q When you say "you [*i.e.*, SWBT] don't move the customers to another switch," if you did, what would that entail?

A (Currie) Well, you would have to reconnect their loops to a different switch in a different wire center, and that's a very expensive activity for customers who are currently having service.

Q And tell me about the *expense* of that activity. You say it's a very expensive activity. Could you explain what all needs to occur for that to happen?

A (Currie) I haven't studied that, so I can just tell you generally what you would have to do. You would have to – one of the problems you have in that is, of course, you've got customers that have service. And this is a behind-the-scenes activity that you don't want to have any transparency to the customers. But you would have to, in fact, *disconnect their appearance in the switch* in which they are currently providing service.

You would then have to move them into a different switch, and my understanding is – from an operational point of view, we don't do that because not only is it expensive, but now you are going to start having customers that are in a particular geographic area normally provided by that switch provide by some other switch, and *that creates all sorts of operational planning and implementation issues*.

And for cost efficiencies, you don't want to do that.

⁵ Texas PUC Docket No. 24542 Hearing Tr. at 612-614, 616; see also Initial Comments of the UNE Platform Coalition, CC Docket Nos. 01-338, 96-98, and. 98-147, filed April 5, 2002, at 49-50.

* * *

A (Currie) I mean, you have to, in fact, do the work to take the connections off the distribution frame. So you've got a bunch of nonrecurring activities that you would have to do. And not only do you have to do those things, but *now you have the difficulty in operating the company.*

Now, where the customer is served, you are planning for an area – you are moving them elsewhere, and you don't want to do that, in general. *It just causes both short-term and long-term planning and operational problems....*

Q ...I just want to be clear because I think this is what you testified. It's not just dollar costs and operations, you also have issues of customer inconvenience or potential customer outage....

A (Currie) Certainly that is one of the considerations that a network organization has.⁶

Again, without the opportunity to develop a full record before a State Commission, the actual facts behind broad policy pronouncements may never emerge.

The PUCT conducted its impairment analysis using the factors established by the FCC in the *Local Competition Order*, such as cost, ubiquity and impact on network operations. The PUCT found that CLECs were materially impaired unless access to certain UNEs was maintained. If the States now were to be denied the opportunity to use a contested proceeding to build a thorough, complete record reflective of local conditions, the validity of the Texas proceeding would be unreasonably and illogically ignored.

Because the majority of the companies listed below are smaller CLECs serving a variety of customers – including small business and residential subscribers throughout the State -- we ask the Commission to consider the impact new rules will have on small businesses. For our companies to survive these economic times, President Bush's Executive Order 13272 simply cannot be treated as a superficial document.⁷ The letter and spirit of that document must be implemented: when issuing new rules, federal agencies must establish policies to protect small businesses. Evidence presented in Texas clearly demonstrates that CLECs' non-recurring costs would increase at least 90% if the FCC were to restrict access to some UNEs.⁸ (This increase,

⁶ Texas PUC Docket No. 24542 Tr. at 612-614, 616 (emphasis added).

⁷ Exec. Order No. 13272 § 1, 67 Fed. Reg. 53,461 (2002).

⁸ Texas PUC Docket No. 24542, Direct Testimony of Joseph Gillan, on behalf of the Texas UNE-P Coalition (December 7, 2001).

however, does not even include additional costs such as collocation.) Based on the data presented before the Texas Commission, it would take approximately five months before a CLEC might be able to absorb the 90% increase in non-recurring charges if the company had a target net profit margin of 10%.⁹

As articulated by the Office of Advocacy of the U.S. Small Business Administration in its February 5, 2003 *ex parte* filing in this docket, the “very existence” of small telecommunications providers is based on the availability of UNEs because CLECs have implemented business models founded on access to UNEs. The success of our businesses has resulted in competitive choices for Texas consumers. As the PUCT held in Docket No 24542, “UNE-P is the only viable option for providing competitive analog voice service to small business customers.”¹⁰ Preemption of Texas’ ability to continue its pro-competitive course would not only undermine the viability of our businesses but also negatively impact our customers who include residential and small businesses. The National Federation of Independent Business’s February 5, 2003 *ex parte* letter in this proceeding, in fact, underscored the essential need for small business consumers to have access to competitive sources. Texas consumers have enjoyed a level of competition yet to be achieved in most states. We ask the Commission not to set in place rules that undermine the continued availability of competitive choices now established in Texas.

Again reiterating that only a rigorous investigation, not unsubstantiated claims, should be the basis of the FCC’s actions, we urge the Commission to use caution when assessing assertions that access to some UNEs diminishes network investment. The FCC’s *Local Telephone Competition Report* clearly indicates that the use of certain UNEs does not diminish the deployment of competitive facilities. In addition, a recent JP Morgan report analyzed the historic levels of investment by the ILECs.¹¹ This analysis debunks the notion that removal of UNEs automatically will result in increased infrastructure investment. Moreover, after reviewing the evidence regarding this issue, the PUCT was “not convinced by [SBC’s] argument that the availability of UNE-P will crowd out investment in the analog network. ... The Arbitrators conclude that the continued availability of UNE-P will allow competitive market forces to provide better guidance and incentive for carriers to make sound and prudent investment decisions regarding the type of technologies to be deployed prospectively.”¹²

⁹ Initial Comments of the UNE Platform Coalition at 45.

¹⁰ Texas PUC Docket No. 24542, Revised Arbitration Award, at 88.

¹¹ Attachment to the Association for Local Telecommunications Services (“ALTS”) *ex parte* letter, CC Docket Nos. 01-338, 96-98, and 98-147, filed February 5, 2003.

¹² Texas PUC Docket No. 24542, Revised Arbitration Award, at 89.

It is undeniable that Texas has conducted rigorous, contested proceedings that have established facts, not unsupported assertions. It is also undeniable, according to the FCC's own data, that Texas has been successful in fostering competition. Respectfully, we urge the Commission not to take away what Texans have achieved.

Sincerely,

AccuTel of Texas, L.P dba 1-8004-A-PHONE

Quick-Tel Communications, Inc.

BasicPhone, Inc.

Rosebud Telephone, LLC

Birch Telecom of Texas, Ltd. L.L.P.

TVS Communications

Buy-Tel Communications, Inc.

Talk America Inc.

Capital 4 Outsourcing, Inc.

Tex-Link Communications, Inc.

Capital Telecommunications, Inc.

United Communications, Inc.

Express Telephone Services, Inc.

ValuTel Communications, Inc.

Extel Enterprises

VarTec Telecom, Inc.

GCEC Technologies

Viteris, Inc.

Habla Comunicaciones, Inc.

WTX Communications

ionex Telecommunicaions, Inc.

Westel, Inc.

Max-Tel Communications, Inc.

Z-Tel Communications, Inc.

nii communications

PhoneCo, L.P.

cc: Chris Libertelli (by hand)
Jordan Goldstein (by hand)
Dan Gonzalez (by hand)
Mathew Brill (by hand)
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William Maher (by hand)
Senator John McCain (by overnight mail)
Senator Ernest F. Hollings (by overnight mail)